

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 7513

Petition of Department of Public Service to           )  
impose penalties and other remedial action upon    )  
Vermont Gas Systems, Inc. ("VGS"), re:               )  
probable violations of Vermont law, pertaining     )  
to gas safety, involving 31 separate locations       )  
installed, owned, operated and/or maintained by   )  
VGS    )

Order entered: 1/27/2011

**ORDER CLOSING DOCKET**

**HEARING OFFICER'S REPORT**

**I. INTRODUCTION**

In this Report, I recommend that the Board approve a settlement<sup>1</sup> between the Vermont Department of Public Service (the "Department") and Vermont Gas Systems, Inc. ("VGS" or the "Company"), pursuant to which the parties have agreed to seek voluntary dismissal of the alleged violations pending for review in this Docket in exchange for VGS's commitment to conduct certain maintenance activities on the Company's natural gas facilities and to inform its contractors and customers on a recurring basis of the need to paint customer-owned piping and gas meter assembly components. The parties have further agreed upon a three-tiered standard to be applied in the future for inspecting and remedying any corrosion identified on the Company's natural gas facilities.

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1. The parties have memorialized their settlement in an executed Memorandum of Understanding ("MOU"), a copy of which is attached to this Report as Exhibit-1. Exhibit-1 includes three attachments, which respectively will be referred to in this Report as "MOU Attachment \_\_\_."

## **II. PROCEDURAL BACKGROUND**

This docket arose from a Notice of Probable Violation (the "NOPV") served by the Department upon VGS on February 27, 2009. The NOPV alleged 31 violations of various federal gas safety code standards that are applicable to Vermont gas utilities pursuant to Section 6.150 of Board Rule 6.100 — the rule governing the construction and operation of natural-gas-service transmission and distribution systems within VGS's service territory. Pursuant to 30 V.S.A. § 2816 and Section 6.104 of Board Rule 6.100, the Department also filed the NOPV with the Vermont Public Service Board ("Board") as a petition seeking an order imposing a civil penalty of \$51,000 and requiring various remedial actions by VGS.

On March 30, 2009, VGS submitted a response to the NOPV that denied all of the alleged violations and requested dismissal of substantially all of the counts detailed in the NOPV.

On May 7, 2009, VGS filed a motion for partial summary judgment and dismissal of the Department's petition based on the NOPV. This filing was followed by an extension request and extensive briefing by the parties.

On October 23, 2009, I issued an Order granting in part and denying in part VGS's motion for partial summary judgment.

On December 11, 2009, the Department filed a request for voluntary dismissal, in whole and in part, of 22 of the 31 Counts in the NOPV.

On February 8, 2010, I issued an Order granting the Department's request to voluntarily dismiss Counts 1, 2, 3, 4, 6, 7, 8, 12, 13, 14, 15, 26, 27 and 30 in the entirety and without prejudice. In that Order, I also granted the Department's request to partially dismiss Counts 5, 16, 17, 18, 19, 20, 24 and 29.<sup>2</sup>

On December 13, 2010, following several rounds of discovery and the prefiling of direct and rebuttal testimony by both parties, the Department and VGS submitted their executed MOU for review and approval by the Board. Subject to the terms of the MOU, the parties have

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2. See Docket 7513, Order dated 2/8/10 at 3.

stipulated to the dismissal, with prejudice, of all of the remaining Counts and supporting allegations as detailed in the NOPV.<sup>3</sup>

### **III. FINDINGS**

1. VGS has agreed to perform certain mitigation measures by December 31, 2010, at the pipe or meter assembly locations identified in the NOPV in connection with Counts 5, 9, 10, 11, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 28, 29 and 31. These mitigation measures chiefly involve painting components and installing vehicle barriers and meter supports. Exhibit-1 at 2; MOU Attachment A.<sup>4</sup>

2. VGS has further agreed to inform customers and contractors that it recommends the painting of customer-owned pipe and meter assembly components. Exhibit-1 at 2; MOU Attachment B.<sup>5</sup>

3. VGS also has committed to maintain information regarding painting of customer-owned piping and meter assembly components on its website. Exhibit-1 at 2.

4. VGS and the Department have agreed to adopt a three-tiered standard for defining and remedying any "corrosion" observed on VGS's facilities. Exhibit-1 at 3.

### **Discussion**

The voluntary dismissal of an action is governed by Rule 41(a) of the Vermont Rules of Civil Procedure, which is applicable to Board proceedings pursuant to Board Rule 2.105. The parties have requested that "the Board take whatever action is necessary to approve the MOU."<sup>6</sup> Furthermore, the MOU contains a stipulation by the parties that the Board should issue an order dismissing this docket "with prejudice."<sup>7</sup> Therefore, I will treat the MOU as a motion for dismissal with prejudice filed pursuant to V.R.C.P. 41(a)(2), which provides for voluntary dismissal by order of court.

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3. The remaining Counts for which the parties are seeking voluntary dismissal in the entirety are Counts 5, 9, 10, 11, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 28, 29, and 31.

4. The specific mitigation measures are detailed in MOU Attachment A.

5. The substantive form of these communications is specified in MOU Attachment B.

6. Letter from Kimberly K. Hayden, Esq., to Susan M. Hudson, dated December 13, 2010, at p. 2.

7. Exhibit-1 at 3; MOU Attachment C at 2-3.

Based on my review of the terms of the MOU, I conclude that the Board should approve the MOU, subject to two clarifications which I discuss below. The public interest will be served by the maintenance activities contemplated by the settlement, as well as by the enhanced communication measures VGS has agreed to direct toward its customers and contractors regarding the need to paint customer-owned pipe and meter assembly components. Furthermore, I commend the parties for establishing mutually-acceptable criteria to use in the future for assessing and remedying, as needed, any corrosion that is identified on VGS's system facilities. Going forward, the regulatory clarity created by this standard will be beneficial for all parties concerned.

Turning next to the first point of clarification, the first paragraph of the Agreement section of the MOU states as follows:

The parties agree that natural gas facilities owned by Vermont Gas up to and including the meter are subject to C.F.R. 49 and Public Service Board Rule 6.1. Customer-owned facilities that are beyond the meter however are subject to National Fire Protection Act Code Section 54 and are as such are [sic] under the purview of the Vermont Department of Public Safety.<sup>8</sup>

This provision of the MOU reflects the parties' agreed-upon legal conclusion with respect to the Board's subject-matter jurisdiction under Board Rule 6.100. If the Board chooses to approve the MOU, then I recommend the Board clarify that its approval neither signifies an acceptance nor otherwise expresses any judgment with respect to the merit of the parties' legal conclusions detailed in paragraph 1 of the MOU.

Turning to the second point of clarification, in the MOU, the parties have stipulated "that the Board should issue an Order dismissing this proceeding in the manner set forth in the proposed Order set forth as Attachment C."<sup>9</sup> I recommend the Board neither adopt nor issue the specific order included in the MOU as MOU Attachment C. Rather, in issuing its order, the Board should state that it regards MOU Attachment C simply as an illustration of the type of Board order the parties are jointly seeking as part of their settlement.

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8. Exhibit-1 at 2, para. 1.

9. Exhibit-1 at 3.

Accordingly, subject to the clarifications I have proposed herein, I recommend that the Board issue an order (1) approving the MOU, (2) dismissing, with prejudice, all of the remaining Counts and supporting allegations as detailed in the NOPV, and (3) closing this docket.

This proposal for decision is not adverse to the interest of any party; it therefore need not be circulated to the parties pursuant to 3 V.S.A. § 811. This report is made to the Public Service Board pursuant to 30 V.S.A. § 8.

Dated at Montpelier, Vermont, this 25<sup>th</sup> day of January, 2011.

s/ June E. Tierney

June E. Tierney, Esq.  
Hearing Officer

#### **IV. ORDER**

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board ("Board") of the State of Vermont that:

1. The Report of the Hearing Officer is accepted.
2. The Memorandum of Understanding dated December 13, 2010 (the "MOU") between the Vermont Department of Public Service (the "Department") and Vermont Gas Systems, Inc. ("VGS") is approved, subject to the following clarifications:
  - a. In approving the MOU, the Board neither accepts nor otherwise expresses any judgment with respect to the merit of the parties' legal conclusions detailed in paragraph 1 of the MOU; and
  - b. The Board neither adopts nor otherwise issues MOU Attachment C as a Board order; rather, the Board has treated MOU Attachment C as an illustration of the type of Board order the parties are jointly seeking as part of their settlement.
3. Counts 5, 9, 10, 11, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 28, 29 and 31 of the Notice of Probable Violation dated February 27, 2009 filed with the Board pursuant to 30 V.S.A. § 2816 are voluntarily dismissed, pursuant to Board Rule 2.105 and V.R.C.P. 41(a)(2).
4. This voluntary dismissal shall be with prejudice, as required by the terms of the MOU.
5. This docket shall be closed.

Dated at Montpelier, Vermont, this 27<sup>th</sup> day of January, 2011.

<u>s/ James Volz</u>	)	
	)	PUBLIC SERVICE
	)	
<u>s/ David C. Coen</u>	)	BOARD
	)	
	)	OF VERMONT
<u>s/ John D. Burke</u>	)	

OFFICE OF THE CLERK

FILED: January 27, 2011

ATTEST: s/ Susan M. Hudson  
Clerk of the Board

*NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)*